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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

NO. 1328

JONES COAL COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA,
for the use and benefit of
RICHARD P. JAHN, TRUSTEE,
Respondent

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

Question Presented

Respondent believes the question as presented by the Petitioner on page 2 of the Petition may more properly be stated as follows:-

MAY A JUDGE OF A UNITED STATES DISTRICT COURT, IN THE EXERCISE OF HIS DISCRETION UNDER *RULE 25(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE*, ORDER THE SUBSTITUTION AS PARTY PLAINTIFF OF AN ASSIGNEE OF THE ORIGINAL CORPORATE PLAINTIFF'S CLAIM, WHERE SAID CORPORATION'S CHARTER HAD BEEN REVOKED FOR NONPAYMENT OF TAXES, AFTER THE ASSIGNMENT, AND AFTER THE ORIGINAL OPINION OF THE DISTRICT JUDGE SUBSEQUENT TO THE TRIAL HAD BEEN FILED, BUT PRIOR TO THE ENTRY OF THE ORIGINAL JUDGMENT, SAID CHARTER HAVING, HOWEVER, BEEN REINSTATED PRIOR TO THE ENTRY OF THE ORDER OF SUBSTITUTION AND THE AMENDED JUDGMENT ?

STATUTES INVOLVED

It is noted that *Rule 25(c) of the Federal Rules of Civil Procedure* is inaccurately quoted on page 3 of the Petition in that the word "shall" in the 2nd line of the quoted paragraph should be stricken and in lieu thereof the word "may" should be substituted. Said Rule 25(c) correctly reads as follows:

> "Transfer of Interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule."

Section 67-2925 of the Tennessee Code Annotated provides as follows:

"Revocation of charter for nonpayment of tax.-- The commissioner of revenue shall certify to the secretary of state the name of any corporation which fails or refuses to file the report and to pay the tax herein required in all cases where such report and tax payment have not been made within ninety (90) days after due date. At the time of such certification to the secretary of state, the commissioner of revenue shall give notice to the corporation of the action taken. Thereupon the charter of such corporation or its domestication in Tennessee shall stand as automatically revoked and the secretary of state shall note such revocation upon his records. At any time after date of revocation such charter may be reinstated upon the filing of all reports and the payment of all fees, taxes, penalty and interest due the state, provided, however, the title has not been taken by another corporation, and further provided that proof be furnished sufficient to the commissioner that no third party will be injured by such reinstatement."

STATEMENT OF THE CASE

Respondent accepts the statement of the case as embodied on pages 3-5 of the Petition so far as it goes. In addition, to properly act on the Petition, the Court should also be aware of the following facts:

1. The assignment to Richard P. Jahn, Trustee, on January 20, 1962 (10a-12a*) was made known to the Petitioner long before the original trial (3b*) but the record does not reflect any effort by Petitioner to cause the substitution of the Trustee under *Rule 25(c) of the Federal Rules of Civil Procedure* at any time.

2. The Charter of Air Comfort, Inc. was reinstated on or about October 14, 1964, after certain back taxes were paid, the failure to pay which had caused the revocation of the Charter (5b).

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* Reference to (10a-12a) is to pages in the Appendix of the Appellant in the Court of Appeals and to (3b) is to a page in the Appendix of the Appellee in the Court of Appeals.

ARGUMENT

The Court of Appeals for the Sixth Circuit did not deem it necessary to rest their decision, which approved the action of the District Judge in permitting the substitution of the Trustee, upon the ground that the corporate charter of Air Comfort, Inc. had been reinstated on or about October 14, 1964 (5b) prior to the order of substitution on November 23, 1964 (16a). Under the decision of the Circuit Court of Appeals for the Sixth Circuit (Appendix C to Petition, pages 11-13) the substitution of the Trustee as party plaintiff by the District Judge was proper even if the charter of Air Comfort, Inc. had not been reinstated prior to the order of substitution or at any other time after the revocation of the Charter.

The leading Tennessee case of *Bland v. Knox Concrete Products*, 207 Tenn. 206, 338 S.W. 2d, 605, plainly holds (338 S.W. 2d 605 at page 608) that where the charter of a Tennessee corporation has been revoked for nonpayment of taxes, its choses in action do not die and those indebted to the corporation are not relieved of their obligations, but that instead the corporation has "a reasonable time to wind up the present affairs and business of the corpration..." and that in any event "the property of the corporation after its dissolution passed to its stockholder or stockholders". Of course in the present case an assignment had already occurred (10a).

Let us assume however, that under Tennessee law the revocation of the charter of Air Comfort, Inc. for nonpayment of taxes effectively prevented it from thereafter maintaining the pending suit which it had filed. Let us further ignore the reinstatement of the charter prior to the order of substitution which actually makes the question raised in the Petition moot. Even if these two assumptions were correct, *Rule 25(c) of the Federal Rules of Civil Procedure* still, by its plain terms, permits the substitution in the discretion of the District Judge. *Moore's Federal Practice*, Volume 4, Section 25.08, page 527.

The restoration of the corporate charter (5b) took place under the provisions of *Section 67-2925 of the Tennessee Code Annotated* which provides for the revocation of a corporate charter for nonpayment of taxes and the reinstatement of such charter upon the payment of back taxes. This Code Section was last amended in 1963, and was in its present form at the time the charter of Air Comfort, Inc. was reinstated. This Code Section has been quoted under the section on Statutes Involved above.

We have been unable to locate any Tennessee decisions passing upon the question of the status of a corporation and the validity of its acts during a period when its charter was revoked for the nonpayment of

taxes, and prior to a time when such charter was reinstated after the back taxes have been paid, as is the case here.

This problem is discussed at Section 4108 of *Fletcher, Cyclopedia Corporations*, and particularly in the cases cited in the annotation at *13 A.L.R. 2d 1220*, entitled "Reinstatement of Repealed, Forfeited, Expired or Suspended Corporate Charter as Validating Acts in Interim". It is believed that the authorities there cited, particularly at pages 1222-1223 of said annotation, justify a construction of *TCA 67-2925* to the effect that the reinstatement of the corporate charter upon payment of back taxes validates the corporation's acts during the hiatus period between revocation and reinstatement of the charter.

The attention of the Court is also called to the decision of the Tennessee Supreme Court in *Cravens v. Tanner*, 291 SW 2d 582 (1956). In that decision the corporate charter had been revoked for nonpayment of taxes prior to the filing of the suit, which suit resulted in a final judgment in favor of the defunct corporation. Thereafter this was discovered by the judgment debtor who sought to have the judgment declared void. The Tennessee Supreme Court declined to so hold in view of the failure of the judgment debtor to raise the issue at an earlier stage in the proceedings.

Rule 25 of the Federal Rules of Civil Procedure does not preclude substitution after judgment for the purpose of subsequent proceedings to enforce the judgment. *Moore's Federal Practice*, Volume 4, Section 25.03, page 513.

It has been held that substitution or joinder is not mandatory where a transfer of interest had occurred. *Sun-Maid Raisin Growers of California v. California Packing Corp.* C.A. Cal. 1959, 273 F2d 282. It is proper however to substitute a Trustee to whom all corporate assets have been assigned. *Altoona Clay Products, Inc. v. Dun & Bradstreet, Inc.* D.C. Pa. 1965, 37 F.R.D. 460.

Of primary importance however is the fact that the substitution in the instant case relates back to the commencement of the action, since it did not change the claim or cause of action. *Fidelity & Deposit Co. of Md. v. Fitzgerald*, C.A. Colo. 1959, 272 F2d 121, Cert. denied. 80 S. Ct. 669, 362 U.S. 919, 4L Ed. 2d 738. Thus the action of the District Judge in substituting the Trustee relates back to the initial filing of the case on January 17,1961 (Petition, page 3). At that time there was no question but that the Charter of Air Comfort, Inc. was in good standing since it was not revoked for nonpayment of taxes until November 13, 1962 (13a).

On page 7 of the Petition the statement is made that the Defendant (Petitioner) has no assurance that prior claims for attorneys fees, taxes, or claims against the corporation by creditors do not exist, inferring some fear on the part of the Petitioner that if it is required to pay the judgment against it, it might be paying the wrong party. If others have a rightful interest in the judgment, who might somehow be able to make the Defendant pay twice, though they have not come forward in the five and one-half years since this litigation was instituted, such a question does not appear to be within the scope of the question presented by the Petition. Nontheless, it is effectively answered in the case of *Cravens v. Tanner*, supra. In that case the same sort of fear was apparently expressed and at the conclusion of its opinion the Tennessee Supreme Court stated (291 S.W. 2d 582 at page 583):

> "In conclusion it is not inappropriate to notice that the Clerk...will no doubt be careful to pay to the proper parties any money which may be collected..."

CONCLUSION

The action of the lower courts should in all respects be upheld. This Petition should be recognized for what it is, namely, a frivolous attempt to delay the inevitable on unwarranted technical grounds. The history of this case, when coupled with the instant petition, justifies this Court in invoking its *Rule 56(4)* and adjudging to the Respondent reasonable damages for delay.

Respectfully submitted,

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